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ABSTRACT

One of a series of bulletins on implementing the Americans with Disabilities Act (ADA), this bulletin discusses protections for individuals with histories of alcohol and drug abuse. The material explains: (1) the ADA prohibits employment discrimination of individuals with past drug and alcohol problems and those who currently have alcohol problems who are able to perform their job; (2) the exclusion of protection of any employee or applicant who is currently engaged in the illegal use of drugs; (3) the protection of individuals who are participating in a supervised drug rehabilitation program or who have completed a treatment program, and are no longer using drugs; (4) the protection of individuals who are erroneously perceived as abusing drugs illegally; (5) the definition of "current" illegal drug use; (6) types of medical tests or inquiries that are permitted to determine a drug or alcohol problem; (7) steps employers can take to ensure that an individual is no longer illegally using drugs; (8) accommodations that need to be provided for individuals with drug and alcohol problems; and (9) how other federal laws relating to drug and alcohol use affect the ADA's standards. Contains a 6-item list of resource organizations. (CR)

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EMPLOYING AND ACCOMMODATING INDIVIDUALS WITH HISTORIES OF ALCOHOL AND DRUG ABUSE

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Why is Drug and Alcohol Abuse Considered a Disability?

Clinicians and researchers commonly divide drug and alcohol consumption into three levels or stages of use: use, abuse, and dependence. While the use of drugs and alcohol does not generally rise to the level of an impairment that constitutes a disability, abuse and dependence do. Drug and alcohol abuse is characterized by intensified, regular, sporadically heavy, or "binge" use, and dependence is characterized by compulsive or addictive use.

Drug and alcohol abuse and dependence are classified as treatable illnesses by both standard diagnostic medical manuals, the Diagnostic and Statistical Manual IV (DSM-IV) and the International Statistical Classification of Diseases, Injuries, and Causes of Death (ICD-10). These manuals also provide criteria for diagnosing drug and alcohol abuse and dependence that focus on psychological, behavioral, and cognitive symptoms. The impact of drug and alcohol use on social and occupational functioning is an important factor in evaluating the severity of an individual's condition.[1] Many individuals with drug and alcohol problems can continue to function in their jobs long after drug and alcohol use has begun to take its toll on family and social functioning.

What Protections Against Discrimination are Provided to Individuals With Drug and Alcohol Impairments?

Many employers do not realize that the Americans with Disabilities Act (ADA) protects individuals with drug and alcohol problems against discrimination in employment. This confusion exists because the ADA imposes some special requirements for the employment of individuals with current drug problems.

People with past drug or alcohol problems are protected from job discrimination by the ADA, as are persons with current alcohol problems who are able to perform their job. The only individuals with drug and alcohol problems who do not have the same rights as others with disabilities are those who currently use drugs **illegally.**

The ADA specifically excludes from the definitions of "individual with a disability" any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use. This includes individuals who use illicit drugs as well as those who use prescription medications unlawfully. Individuals who use drugs under the supervision of a licensed health care professional -- such as methadone -- **are not** using drugs illegally, and therefore could be protected against discrimination.

Although individuals with current drug problems are not protected, the ADA specifically protects individuals who are participating in a supervised drug rehabilitation program or who have completed a treatment program or have been rehabilitated through self-help groups, employee assistance programs or any other type of rehabilitation, and are no longer using drugs.

In addition, the ADA protects individuals who are erroneously perceived as abusing drugs illegally, but are not doing so. Because of societal attitudes about drug abuse, many individuals who have had drug problems in the past are perceived as still being drug dependent. Similarly, individuals who participate in methadone maintenance programs are also often perceived as drug dependent, even though methadone is a lawfully prescribed medication and individuals who participate in a methadone maintenance program are able to do every task -- even safety-related tasks -- that a person who is not receiving such treatment can do. These individuals are protected against discrimination under the ADA.

Workplace drug testing programs also create a pool of individuals who may be erroneously perceived as being drug

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dependent when, in fact, they are not. Invariably, drug tests will inaccurately identify some individuals as drug users. This occurs because the drug test may be performed incorrectly, substances in an individual's system may be incorrectly identified as a drug, or a prescription medication may be incorrectly identified as an illicit drug. The ADA prohibits discrimination against individuals who are erroneously regarded as engaging in the illegal use of drugs because of a false positive drug test, but are not engaging in such use.

Individuals with current alcohol impairments are protected against discrimination like any other individual with a disability. Alcohol is not considered a "drug" under the ADA, and, therefore, the current abuse of alcohol **does not** exclude an individual from the ADA's protection. Individuals with current alcohol impairments, like any other individual with a current disability, must be able to perform the essential functions of the job to be protected against discrimination. In addition, the ADA specifically permits an employer to hold employees who abuse alcohol to the same performance and conduct standards applicable to all employees, even if that employee's problems are related to the alcohol abuse.

What is "Current" Illegal Use of a Drug?

To determine whether an employee or job applicant is "currently" using drugs illegally, an employer must make an individualized determination that focuses on whether the individual has used drugs close enough to the time of the employment action to indicate that there is a real and on-going problem. It is not permissible to impose a blanket time limitation, such as 30 or 60 days of abstinence from drugs, as a way to define what is "current" illegal use of drugs. In addition, because the ADA protects individuals who are participating in a rehabilitation program and those who have been rehabilitated (as long as they are not still using drugs illegally), employers should be careful about reaching back in time and taking adverse actions against individuals for drug use that occurred before they entered treatment.

What Medical Tests or Inquiries are Permitted to Determine Whether an Individual has a Drug or Alcohol Problem?

The permissible scope of medical tests and inquiries depends upon whether an employer is seeking information, on the one hand, about a current drug impairment or a current or past alcohol impairment or, on the other, past drug impairment. Because the current illegal use of drugs is not a protected disability, employers can obtain information about drug use that they could not otherwise get about other disabilities.

For example, employers may ask a job applicant about current illegal use of drugs prior to a conditional offer of employment. They may also ask an employee about current illegal use of drugs at any time without showing that the inquiry is job related or required by business necessity. Finally, the ADA explicitly states that a test to detect the illegal use of drugs is not considered a medical examination, and, therefore, drug tests may be given prior to a conditional offer of employment or at any time in an employee's tenure.

Employers must be careful, however, in conducting a drug test prior to a conditional offer of employment because the drug test could reveal information about other disabilities that applicants have a right to withhold until after an employment offer. For example, a drug test could reveal the presence of dilantin, which is used to treat epilepsy, or methadone, which is used to treat heroin addiction. If such protected information is obtained, employers cannot use such information in a way that violates the ADA. The ADA also requires that information collected from medical examinations and inquiries be collected and maintained on separate forms and in separate medical files and treated as a confidential medical record.

Inquiries about alcohol use or past drug use, on the other hand, must be treated like inquiries about any other disability. Such inquiries cannot be made of applicants until after a conditional offer of employment or of employees except when job related or required by business necessity. In addition, urine or breath tests that detect the use of alcohol cannot be done prior to a conditional offer of employment or cannot be required of an employee unless the test is job related and required by business necessity.

What Can an Employer Do To Ensure that an Individual is No Longer Using Drugs?

The ADA permits employers to take reasonable steps to ensure that an individual is no longer illegally using drugs. Employers are permitted to conduct drug tests and to obtain information from treatment programs in order to monitor drug use. If an employer has an employee assistance program (EAP), the EAP may be the best entity to conduct the follow-up.

While the ADA does not impose many restrictions on drug testing, employers are required to use accurate test procedures and to comply with any federal, state, or local law that regulates drug testing.

In addition, when seeking information from a drug or alcohol treatment program about an individual's rehabilitation, employers should be aware that federal regulations govern the release of drug and alcohol patient information by virtually all treatment programs.[2] These regulations, in order to protect the confidentiality of individuals with drug and alcohol problems, require the execution of a detailed consent form before employers can receive treatment information and place strict limitations on the employer's use, maintenance and redisclosure of that information. Because these regulations impose more stringent confidentiality standards than

those in the ADA, they supercede the ADA's requirements for protection of drug and alcohol treatment information.

What Accommodations Do Individuals With Drug and Alcohol Problems Need?

Accommodations for individuals in recovery from a drug or alcohol problem will vary depending upon the requirements of their jobs and their length of time in recovery. For example, individuals who have recently completed a rehabilitation program may need to participate in a structured, out-patient continuing care program on a regular basis. Others who have been sober for a long time will participate in self-help groups, such as Alcoholics Anonymous, for the rest of their lives in order to prevent relapse. Involvement in such continuing care may require some accommodation.

Examples of necessary accommodations could include:

- a modified work schedule to permit an employee to pick up her daily methadone dosage or to attend an out-patient relapse prevention counseling session.
- job restructuring to relieve an employee of particular marginal tasks that may compromise recovery or be inappropriate in the early stages of recovery.
- temporary reassignment of an employee in a safety-related position to a vacant non-safety sensitive position while he or she completes treatment.

In addition, because individuals with current alcohol impairments are protected against discrimination to the extent they can perform their job effectively and safely, employers are required to consider providing unpaid leave to permit an individual with a current alcohol impairment to attend an in-patient treatment program. In addition, if an employer provides paid leave to individuals who are obtaining medical treatment for a disability, the employer must provide the same benefit to an individual who is obtaining treatment for an alcohol problem.

Some employees will need no accommodation, but simply a change in attitude regarding what an individual with a past drug or alcohol impairment can do. It is important to understand that such individuals are able to perform all jobs safely, including safety-related jobs, and that they pose no risk to others solely because of a past drug or alcohol addition. An employer's most important obligation under the ADA is to evaluate the individual's ability to do the essential job tasks and make employment decisions based on the individual's qualifications and work performance.

How Do Other Federal Laws Relating to Drug and Alcohol Use Affect the ADA's Standards?

The ADA permits employers to comply with other federal laws and regulations that relate to drug and alcohol use. These federal standards include the Drug Free Workplace Act and standards established by the Department of Transportation, Department of Defense, and the Nuclear Regulatory Commission relating to testing safety-sensitive employees for drug use, and in some cases, alcohol use. The standards established by these other federal laws and rules are consistent with the ADA and, generally do not restrict the rights of individuals in safety-related jobs beyond what the ADA permits.

The drug testing regulations, in particular, cover a fairly narrow set of employees whose jobs directly affect safety. They require employees to comply with restrictions on off-duty drug and alcohol use and prohibit individuals who violate drug or alcohol rules from holding safety-sensitive jobs. The regulations give employers the right to determine when individuals who have tested positive for drug or alcohol may return to work in the safety-related position.

Apart from these standards, the ADA does not permit employers to treat individuals with past drug or alcohol impairments who hold safety-related jobs any differently from other employees.

Resources

For information on the Americans with Disabilities Act and accommodations the following can be contacted:

ADA Regional Disability and Business Technical Assistance Center Hotline, 800/949-4232 (voice/TTY).

The Equal Employment Opportunity Commission, 1801 L Street, N.W., Washington, DC 20507, 800-669-4000 (Voice) to reach EEOC field offices; for publications call (800) 800-3302 or (800)-669-EEOC (voice/TTY).

There are a number of organizations that can provide information about drug and alcohol problems and assist individuals with such problems. Some of these are:

Employee Assistance Professional Association, 4601 North Fairfax Drive, Suite 1001, Arlington, VA 22203, 703/522-6272.

Job Accommodation Network (JAN), West Virginia University, PO Box 6080, Morgantown, WV 26506-6080, (800) ADA-WORK (voice/TTY).

Legal Action Center, 153 Waverly Place, New York, NY 10014, 212/243-1313, and 236 Massachusetts Avenue, N.E., Suite 510, Washington, DC 20002, 202/544-5478.

The Workplace Center, Columbia University, School of Social Work, 622 West 113th Street, New York, NY 10025, 212/854-5458.

[1] Institute of Medicine, Treating Drug Problems, 61-62, 69-72 (1990).

[2] Confidentiality of Alcohol and Drug Abuse Patient Records, 42 C.F.R. Part 2.

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OTHER TITLES IN THIS *IMPLEMENTING THE ADA* SERIES ARE:

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Working Effectively with Employees who have Sustained a Brain Injury
Employing and Accommodating Workers with Psychiatric Disabilities
Employing and Accommodating Individuals with Histories of Alcohol and Drug Abuse
Employment Considerations for People who have Diabetes
Accommodating the Allergic Employee in the Workplace
Causes of Poor Indoor Air Quality and What You Can Do About It
Working Effectively with People with Learning Disabilities
Working Effectively with Individuals who are HIV-Positive

These and other informational brochures can be accessed on the World Wide Web at:
www.ilr.cornell.edu/ped/ada

For further information about publications such as these, contact the ILR Program on Employment and Disability, Cornell University, 102 ILR Extension, Ithaca, New York 14853-3901; or at ***607/255-2906*** *(Voice),* ***607/255-2891*** *(TTY), or* ***607/255-2763*** *(Fax).*

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